

In the High Court of Punjab and Haryana at Chandigarh

CUSAP No. 20 of 2006

Date of Decision: 08.03.2007

The Commissioner of Customs, Amritsar

...Appellant

Versus

M/s Enkay (India) Rubber Co. Pvt. Ltd.

...Respondent

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

HON'BLE MR. JUSTICE RAJESH BINDAL

Present: Mr. Ashwinie Kumar Bansal, Advocate,
for the Appellant.

Mr. Avneesh Jhingan, Advocate,
for the Respondent.

JUDGMENT

M.M. KUMAR, J. (Oral),

The Revenue has filed the instant appeal under Section 130 of the Customs Act, 1962 (for brevity, 'the Act'), against the order dated 23.1.2006, passed by the Custom, Excise and Service Tax Appellate Tribunal, New Delhi (A-1) in Appeal No. C/181/05-NB (SM), dated 20.2.2006, upholding the orders of the Commissioner (Appeals), dated 25.11.2004 (A-2 & A-3), directing the Adjudicating Authority to reconsider the matter in so far as the value of pre-

imported goods is concerned. The following substantial questions of law are raised in the appeal:

- “(a) Whether after a conscious interference by the legislature to do away with the power of remand by the Commissioner (Appeals) vide amendment to Section 35A of the Central Excise Act, 1944 w.e.f. 11.05.2001 under the Finance Bill, 2001 and after removal of the words ‘*or may refer the case back to the adjudicating authority with such directions as he may think fit for a fresh adjudication or decision*’ from section 128 of the Customs Act, the Commissioner Appeals has any power to remand back a case to the adjudicating authority?
- (b) Whether the Commissioner (Appeals) has no powers to remand back cases to the adjudicating authority under section 128 of the Customs Act, 1962?”

With the consent of learned counsel for the parties the appeal has been heard for final disposal for determination of the above referred substantial question of law. The short issue raised before us by the learned counsel for the Revenue is that the power of remand, which was earlier conferred on the Commissioner (Appeals) by the Finance Act, 1980, was specifically taken away by the Finance Act, 2001. The later provision came into effect from 11.5.2001.

Relevant provisions of the Act as existed before the amendment dated 11.5.2001 and thereafter, are extracted below for ready reference:-

Section 128A(3) before amendment:

“ The Commissioner (Appeals) may, after making such further inquiry as may be necessary, pass such order as he thinks fit confirming, modifying or annulling the decision or order appealed against, or may refer the case back to the adjudicating authority with such directions as he may think fit for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary.”

Section 128A(3) after amendment:

“ (3) The Commissioner (Appeals) shall, after making such further inquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against.”

Learned counsel has submitted that by necessary intendment it has to be construed that there is no power of remand with the Commissioner (Appeals) under Section 128(3) and, therefore, the order passed by the Commissioner (Appeals) on 25.11.2004 is without jurisdiction as also the order passed by the Tribunal upholding the aforementioned order.

Mr. Avneesh Jhingan, learned counsel for the respondent, however, has submitted that the power of remand could still be read in the amended provision because the provisions is

widely worded as the Commissioner (Appeals) has been empowered to pass any such order as he thinks just and proper. According to the learned counsel, it must be read to include the power of remand and in cases where factual data is required to be analysed by the Adjudicating Authority then remand would be in the interest of justice.

After hearing learned counsel for the parties, we find that there is merit in the contention raised on behalf of the Revenue. Once the power of remand has been expressly taken away by the Finance Act, 2001, which came into operation w.e.f. 11.5.2001, the Commissioner (Appeals) is divested of power to remand the case back to the Adjudicating Authority. It cannot be argued that the power of remand should still be read into the provision which survive after deleting the words '*or may refer the case back to the adjudicating authority with such directions as he may think fit for fresh adjudication or decision*'. There is expression of necessary intendment in deletion of the aforementioned expression by the Legislature. In that regard we place reliance on the judgments of Hon'ble the Supreme Court in the cases of **Hitendra Vishnu Thakur v. State of Maharashtra**, (1994) 4 SCC 602; **Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar**, (1999) 8 SCC 16; and **Garikepadi Veeraya v. Subbiah Choudhry**, AIR 1957 SC 540.

In view of the above, the impugned orders dated 25.11.2004 (A-2 and A-3), passed by the Commissioner (Appeals) as well as the order dated 23.1.2006 (A-1) passed by the Tribunal, are

set aside. The matter is sent back to the Commissioner (Appeals) for decision in accordance with law. As the matter has been pending before the Tribunal as well as this Court, we deem it just and appropriate to direct the Commissioner (Appeals) to decide the appeal within a period of four months from the date of receipt of certified copy of this order.

The Appeal stands disposed of in the above terms.

(M.M. KUMAR)
JUDGE

(RAJESH BINDAL)
JUDGE

March 8, 2007

Pk Kapoor